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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-482

VICTOR L. MARCHETTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

PAGE

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Statement of the Case 2

REASONS FOR GRANTING THE WRIT:

I. The injunction violates the First Amendment 15

II. The federal courts have no jurisdiction to entertain the Government's complaint 23

III. The Government has exercised an intolerable degree of control over the defendant's preparation of his defense, thus creating a denial of due process and a high potential for the miscarriage of justice 26

CONCLUSION 29

APPENDIX:

Opinion in the United States Court of Appeals 1a

Memorandum Opinion and Order 19a

Permanent Injunction 29a

Table of Authorities

PAGE

Cases:

Bantam Books v. Sullivan, 372 U.S. 58 (1963) 21
Barrows v. Jackson, 346 U.S. 249 (1953) 19

Carroll v. Princess Anne, 393 U.S. 175 (1968) 22
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 20

Debs, In Re, 158 U.S. 564 (1895) 23, 24

Epperson v. Arkansas, 393 U.S. 97 (1968) 18
Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970) 19

Freedman v. Maryland, 380 U.S. 51 (1965) 21, 22

Garrity v. New Jersey, 385 U.S. 493 (1967) 18

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 19
King v. Smith, 392 U.S. 309 (1968) 18-19
Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957) 22

Lamont v. Postmaster General, 381 U.S. 301 (1965) 20

Mitchell v. Bass, 252 F.2d 513 (8th Cir. 1958) 28

Near v. Minnesota, 283 U.S. 697 (1931) 20
New York Times v. Sullivan, 376 U.S. 254 (1964) 20
New York Times v. United States, 403 U.S. 713 (1971) 10, 14, 15, 16, 17, 18, 20, 24, 25, 28

Pickering v. Board of Education, 391 U.S. 563 (1968) ..18, 19

PAGE

Sanitary District of Chicago v. United States, 266 U.S. 405 (1925) 24
Shelley v. Kramer, 334 U.S. 1 (1948) 19
Sullivan v. United States, 395 U.S. 169 (1969) 24

United States v. Arlington County, 326 F.2d 929 (4th Cir. 1964) 24
United States v. City of Jackson, 318 F.2d 1 (5th Cir. 1963) 24
United States v. City of Shreveport, 210 F. Supp. 36 (W.D. La. 1962) 24
United States v. Republic Steel, 362 U.S. 482 (1960) 24
United States v. Russo and Ellsberg, No. 9373 (WMB) —CD (C.D. Calif. 1972) 28

Wyandotte Transportation Co. v. United States, 389 U.S. 191 (1967) 24

Constitutional Provisions:

United States Constitution
First Amendment 2, 9, 15, 18, 19, 21, 22, 24, 25, 26
Fifth Amendment 2, 9

Rule:

Rule 5, F.R.A.P. 7

Statutes:

5 U.S.C. §552(b)(1) 23
18 U.S.C. §793(e) 23
28 U.S.C. §1192(b) 7

PAGE

28 U.S.C. §1254(1) 1
28 U.S.C. §1345 ..... 9, 23
42 U.S.C. §2280 26
50 U.S.C. §403(d)(3) 23

Other Authorities:

Executive Order 10501 ..... 4, 9, 11, 21
Executive Order 11652 9
Marchetti, *The Rope Dancer* (Grosset and Dunlap 1971) 3, 13
Marchetti, "CIA: The President's Loyal Tool" (article in April 3, 1972 issue of The Nation) 3
Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations, 92nd Cong., 1st Sess. (1971) 16-17
Hersh, S. M., My Lai 4 (New York 1970) 19
Hammer, R., One Morning in the War (New York 1970) 19
Emerson, *The System of Freedom of Expression*, 506 (1970) 20

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on September 11, 1972.

Opinions Below

The opinions of the Court of Appeals for the Fourth Circuit and the United States District Court for the Eastern District of Virginia are unreported. They are set out in the Appendix, *infra,* p. 1a and p. 19a respectively.

Jurisdiction

The judgment of the Court of Appeals was entered on September 11, 1972. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether an injunction which requires petitioner, a former employee of the Central Intelligence Agency, "to submit to the Central Intelligence Agency, for examination 30 days in advance of release to any person or corporation, any manuscript, article or essay, or other writing, factual, fictional or otherwise, which relates to or purports to relate to the Central Intelligence Agency, intelligence, intelligence activities, or intelligence sources and methods," which authorizes the Central Intelligence Agency to forbid disclosure of "information which is classified and which has not been placed in the public domain by prior disclosure," and which forbids petitioner from disclosing such information, "in any manner," is a prior restraint forbidden by the First Amendment.

2. Whether there is any jurisdictional basis for the cause of action asserted by the Executive Branch in this case.

3. Whether the degree of control exercised by the Executive Branch over the preparation of petitioner's defense denied him due process of law guaranteed by the Fifth Amendment.

Statement of the Case

The defendant, Victor L. Marchetti,[1] was employed by the Central Intelligence Agency in October 1955. He resigned from the Agency in September 1969 having reached the grade of GS-15. During his employment he had held a

[1] Petitioner is referred to throughout as the defendant.

variety of posts including that of Special Assistant to the Deputy Director.

After his resignation, Mr. Marchetti published a novel entitled *The Rope Dancer* (Grosset and Dunlap 1971). The novel revolves around an agency called the "National Intelligence Agency." Its central plot features an employee of the agency who turns over agency documents to the Soviet Union. Mr. Marchetti also published an article in the April 3 1972 issue of The Nation magazine entitled "CIA: The President's Loyal Tool." The article was in general a critical survey of some of the CIA's policies and practices. During the Fall and Winter of 1971, Mr. Marchetti appeared on a number of television and radio shows and gave interviews to the press.

On April 18, 1972, the United States initiated an action for injunctive relief against the defendant. Without notice to the defendant, the government filed an application for a temporary restraining order before the Hon. Albert V. Bryan, Jr., U.S.D.J., in the United States District Court for the Eastern District of Virginia. Judge Bryan issued a temporary restraining order *ex parte*. The summons, complaint and the temporary restraining order were served upon the defendant about one hour and a half after the temporary restraining order was issued. The T.R.O. restrained the defendant from "disclosing in any manner . . . any manuscript, article or essay, or other writing, factual, fictional or otherwise, which relates or purports to relate to the Central Intelligence Agency, intelligence, intelligence activities, or intelligence sources or methods . . . without prior authorization from the Director of Central Intelligence . . . ."

The complaint alleged that the purpose of the action was to secure an order enjoining Mr. Marchetti "from breaching the terms and conditions of secrecy agreements entered into by defendant while he was an employee of the Central Intelligence Agency (hereinafter referred to as the Agency), which agreements constitute a contract between defendant and the Agency, by disclosing, publishing, or otherwise revealing certain intelligence information or other classified information relating to intelligence sources and methods, and to obtain an order requiring the defendant to submit to the Agency for examination certain writings, in advance of their release, to insure that the information contained therein is not classified in accordance with Executive Order 10501, or otherwise covered by the terms and conditions of the aforementioned secrecy agreements . . ." (Complaint, para. 3).

The secrecy agreements relied upon by the government were signed by the defendant on October 3, 1955, at the beginning of his employment with the CIA, and on September 2, 1969, upon termination of his employment. These two documents are set out in the Opinion of the Court of Appeals, App., *infra*, pp. 3a-5a.

The complaint further alleged that "Notwithstanding his acceptance of the terms and conditions of the aforesaid secrecy agreements, the defendant has breached these terms and conditions on numerous occasions by publishing articles in which he divulged classified information covered by the terms and conditions of such agreements and by discussing with radio and television commentators such classified information" (Complaint, para. 19), without authority from the Director of the Central Intelligence Agency (Complaint, para. 20). And, alleged the complaint

(para. 22), "the defendant intends to persist in unauthorized disclosures of intelligence sources and methods and other classified information covered by the terms and conditions of his secrecy agreements."

The complaint went on to allege that the defendant had written an article for "a periodical magazine with nationwide circulation [hereinafter the Esquire article or "Twilight of the Spooks"] "which contained currently classified information relating to sources of intelligence and the Agency's methods of operation, the unauthorized disclosure of which would result in grave and irreparable damage to the national defense interests of the United States and the conduct of foreign relations" (Complaint, para. 23). The complaint also alleged that the defendant "has arranged for the publication of a non-fiction book. There is substantial likelihood that this book will divulge currently classified information and currently classified information relating to intelligence sources and methods, the disclosure of which would violate the terms and conditions of the defendant's secrecy agreements and result in grave and irreparable injury to the interests of the United States" (Complaint, para. 25).

Upon filing the complaint and application for a T.R.O., the government filed as sealed exhibits the Esquire article, the typescript of an outline for a book entitled "A concept for a book about the Central Intelligence Agency," written by the defendant [hereinafter the book outline], and an affidavit of Thomas H. Karamessines, a Deputy Director of the Central Intelligence Agency, "analyzing the aforementioned article and specifying, for this Court's consideration, those instances in which the aforementioned article discloses currently classified intelligence sources and

methods." (Affidavit of Richard Helms, Director of Central Intelligence, dated April 17, 1972.)[2]

On Friday, April 21, 1972, defendant appeared in the District Court with counsel and moved to dissolve the temporary restraining order and for access to the plaintiff's sealed exhibits.

In an affidavit accompanying the motion to dissolve, the defendant, among other things, said: (a) he believed himself bound by law and his personal moral code not to divulge information which would injure the security of the United States; (b) that it had been his intention all along, as was known by the government, to submit a manuscript of the proposed non-fiction book to the CIA; (c) that the Esquire article is not to be published in its present form; (d) and that his purpose in speaking and writing about the CIA was pursuant to his belief that "unless the people are informed about the policies and practices of the Agency, they cannot intelligently participate in decisions about what powers should be given to this vital instrument of government and how they should be exercised." He continued:

> My years of experience in the Agency have led me to believe that the CIA and United States intelligence have grown beyond the actual needs of the nation. There is a great deal of redundancy, waste and inefficiency in the intelligence business today, and many of the operations undertaken by the CIA and other intelligence agencies are counter productive and harmful to the nation. Such activities, unrelated to the

[2] The substance of the Karamessines affidavit is set out in the sealed brief separately filed with this petition.

> national security, would not be tolerated by an informed public and an informed Congress. I believe that the CIA's action in this case has been taken, not to protect the national security, but to prevent embarrassment to the Agency which would result from public knowledge of the activities and policies I have just mentioned (Affidavit, pp. 2-3).

Both the motion to dissolve and the motion for access to the sealed exhibits were denied.[3]

On April 24, 1972, defendant filed a Petition for Leave to Appeal to the Fourth Circuit pursuant to 28 U.S.C. §1192(b) and Rule 5, F.R.A.P. (the district court judge having signed the necessary certificate under §1192(b)), and a Petition for Writ of Mandamus and Writ of Prohibition. The Court of Appeals heard oral argument on Wednesday, April 26, 1972. It denied the petition to appeal and the writs, but issued an injunction forbidding the CIA and the Executive Branch from dissuading prospective defense witnesses from testifying or influencing their testimony.[4]

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[3] Defendant of course had copies of his Esquire article and the book-outline which he had given to his attorneys at their first meeting. Counsel so stated in open court. The motion for access actually referred, therefore, only to the Karamessines affidavit, which contained the heart of the government's case, so far in the chronology undisclosed to the defendant or his lawyers.

[4] The government did not inform the defendant until Monday, April 24, 1972, that he and one of his attorneys had been cleared for access and could examine the sealed exhibits. In the course of the next few days other of the defendant's attorneys were cleared. Prospective witnesses had to be cleared before counsel could tell them what the case essentially was about. Defendant's lawyers' secretaries needed clearance before they could type material which included classified information. Some parties were cleared within twenty-four hours. Others took two days or more. Two prospective wit-

On April 28, 1972, the date set for hearing on the preliminary injunction, the defense reluctantly asked for a two week adjournment because the need to obtain security clearance for prospective witnesses before the facts of the case could be described, impeded preparation of the defense case. The T.R.O. was continued and the hearing was adjourned to May 15th at which time the hearings on the preliminary and final injunctions were to be merged.

In the interim, both parties engaged in discovery. The defendant deposed Mr. Karamessines and Mr. Osborn, CIA Director of Security.[5] The government's opposition to defendant's notice to take the deposition of Richard Helms, Director of the CIA, was sustained by the district judge. The government deposed the defendant.

The defendant's request to produce the sealed exhibits and transcripts in the *New York Times* and *Washington Post* cases was successfully resisted by the government.

The defendant filed his answer on May 12th. The answer admitted essentially all the purely factual allegations and denied essentially all the legal consequences which were alleged to flow therefrom. By way of defense, the answer asserted that the complaint failed to state a claim

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nesses were denied clearance. One of them, Prof. Richard Falk of Princeton, was ordered cleared by the district judge after a hearing. All that the government put forward to support its denial of Prof. Falk's clearance was that he had been in North Vietnam, had told an FBI agent that he wouldn't cooperate with the government in the prosecution of Daniel Ellsberg (an old friend of Prof. Falk's), and that he was sympathetic to what Ellsberg had done. The district judge held it unreasonable to deny clearance on that basis. The defense did not pursue the other denial of security clearance.

[5] Both of the depositions are designated "secret" and sealed, at the government's insistence.

upon which relief could be granted, that 28 U.S.C. §1345 did not confer jurisdiction upon the court to grant injunctive relief, that the court lacked jurisdiction over the subject matter, and that the secrecy agreements and E.O. 10501[6] were illegal and void because they violated the First Amendment and the due process clause of the Fifth Amendment.

At trial, after the court denied defendant's motion to dismiss, the government put on two witnesses, Mr. Karamessines and Mr. Osborn.[7]

Mr. Karamessines' testimony on direct examination essentially followed the outline of his earlier affidavit. On cross-examination, the defense sought to have Mr. Karamessines describe specifically and in detail the reasons underlying and supporting the conclusions he asserted concerning the effect that disclosure of six events would have upon the national security and defense, and established that Mr. Karamessines was not qualified to assert those conclusions.

It was at this point in the proceedings that the district judge rejected the defense's First Amendment theory of the case. It was then decided that, since the testimony of all of the defense witnesses rested upon its rejected theory, the outline of their testimony would be put into the record

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[6] E.O. 10501 is the Executive Order which establishes the system of classification and the procedures for treating classified information. It has been superseded by E.O. 11652 effective June 1, 1972. Both Executive Orders can conveniently be found in Government Loyalty and Security Manual (BNA) 15:75–15:95. Adoption of the new Executive Order has no effect on defendant's claims.

[7] Since most of the testimony of the government's witnesses was heard *in camera*, it is treated in detail in the sealed brief which has been separately filed with this petition.

as a written proffer. The proffers are themselves sealed because they treat in detail the material in the Karamessines affidavit, which was repeated on Mr. Karamessines' direct examination. The defense witnesses' testimony would have shown that, under the standard set out in Mr. Justice Stewart's opinion in *New York Times* v. *United States*, 403 U.S. 713, 730 (1971), the disclosures by Mr. Marchetti would not "surely result in direct, immediate and irreparable injury" to the United States or its people. The witnesses would have included Prof. Abram Chayes, Harvard Law School, former Legal Advisor to the State Department; Morton Halperin, former Deputy Assistant Secretary of Defense in the Office of the Assistant Secretary of Defense (International Security Affairs) and subsequently Senior Staff Member of the National Security Council; Richard Falk, Albert G. Milbank Professor of International Law, Princeton; and Prof. Paul Blackstock, School of International Affairs, University of South Carolina, an expert on intelligence and intelligence organizations.*

The government's second witness was Howard J. Osborn, CIA Director of Security. The purpose of his testimony was to show that the defendant, in the course of his newspaper, radio and television interviews referred to above, had revealed classified information. In his affidavit Mr. Osborn had listed thirty-five such interviews and stated that "information contained in those public statements constituted the disclosure of information covered by the

* It was and continues to be the defense's claim that on the face of the Karamessines affidavit and his testimony, quite apart from any evidence to be put on by the defendant, the government had not begun to approach the heavy burden required by the *New York Times* case. The purpose of the proffered testimony would be merely to have nailed down that claim.

terms of the secrecy agreement entered into by Victor L. Marchetti on October 3, 1955" (Affidavit, p. 2). At his deposition, upon being examined about the contents of each of the thirty-five items, Mr. Osborn specified thirty-two items of information he said were classified pursuant to E.O. 10501. The thirty-two items are set out in defendant's Request to Produce, dated May 12, 1972, a sealed exhibit. The Request asked that the United States produce "the specific documents that carry the appropriate markings, pursuant to Section 5 of E.O. 10501, which demonstrate that the following [thirty-two items of] information, as testified to by Howard J. Osborn at his deposition . . . is classified pursuant to E.O. 10501." Those requested documents were not produced. However, at trial Osborn testified as to four such items (Tr. 105, 107-111). Upon cross-examination he abandoned one of them (Tr. 115-116). Of the remaining three, he conceded that two had clearly been made public elsewhere (Tr. 121-122, 122-123) and that the last one had been publicly alluded to indirectly (Tr. 123-126). Documents bearing a classification stamp were produced as to two of the four items to which Osborn testified (Tr. 112, 113).

On cross-examination, Mr. Osborn testified that other former CIA employees who had signed secrecy agreements identical to the one signed by the defendant, had revealed classified information without provoking government sanctions (Tr. 129-131).[9]

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[9] The unsealed response of Mr. Richard Helms to written interrogatories put to him after the defense was denied the right to take his deposition, said that "Of my own knowledge, former Agency employees who did not submit articles for publication include Thomas Braden, Miles Copeland and Thomas McCoy." He added, "However, there are on record numerous instances where such approval has been sought and has been obtained prior to publication:

The government rested upon the testimony of Mr. Karamessines and Mr. Osborn (Tr. 140). The defense motion for a directed verdict was denied (Tr. 141).

The defense called the defendant to testify. His testimony related principally to the objectives he hoped to achieve in writing and speaking about the Central Intelligence Agency.

Mr. Marchetti stated that he has been addressing his "criticism to the United States Intelligence Community in general, of which the CIA is only one organization" (Tr. 143). He believes it "has grown too large, too expensive; it has grown beyond the needs of the people of this country" (*Ibid.*). He also believed that Congress does not receive enough information about the work-product of the CIA and the intelligence community (Tr. 143-144). He pointed out that Senator Symington, a member of the Senate subcommittee charged with oversight of the CIA, has complained that the committee has not met all year. "There is not sufficient Congressional involvement in the policy decisions involving United States Intelligence and the CIA" (Tr. 144).

He believes that the "CIA and to a lesser extent other United States Intelligence Agencies have involved themselves in certain activities which I think are questionable . . . [and] are being carried out without the advice and consent of Congress or even without their knowledge" (Tr. 144-145). He stated that "it is time that more in-

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for example, Allen Dulles, Lyman Kirkpatrick and Francis Gary Powers" (Answer to Question 23).

formation be made available in the hopes that eventually Congress will conduct a review of the intelligence community in order to carry out some reforms" (Tr. 145). He expressed the hope that "we may have a better organization and perhaps avoid the problems that have sometimes occurred in the past in other countries where secret organizations turn into . . . secret police-type organizations" (Tr. 146).

Mr. Marchetti asserted that his experience within the CIA provides him with "some unique experience that allows me to make certain judgments that the ordinary citizen would not be able to make . . ." (Tr. 146). At the same time, he said, he believes "that I can make the main point, the main criticisms as to need for a greater direction and control, need for more economy and need for less indulgence in covert action activities and the other criticisms and suggestions I have without providing any information that would be harmful to the national security" (Tr. 148).

Mr. Marchetti's novel, The Rope Dancer, was read in manuscript by a CIA officer before publication (Tr. 155). Mr. Marchetti did not submit the manuscript for review; rather, he acceded to a request of the CIA officer to read it at his home (Tr. 151-155).

He is now working on another novel. He does not believe that he has "any sort of an agreement or any moral obligation to submit a work of fiction to the Agency, but I am under a restraining order, of course, at this point, and I would not submit it to the publisher without having this legal issue cleared up" (Tr. 149).

He is also working on a non-fiction book about intelligence for which he has a contract with Alfred Knopf

(Tr. 149). He has always intended to submit that manuscript to the Agency for review prior to publication (Tr. 150). Prior to securing the contract with Knopf, he had submitted copies of the Esquire article and the book outline to six publishers (Tr. 158).

At the completion of the defendant's examination and cross-examination, the district judge issued a preliminary injunction in the exact terms of the T.R.O. (Tr. 178). On May 19th, the district judge filed a memorandum opinion and order and issued a permanent injunction "identical in terms to the temporary restraining order heretofore entered." [10] The court held that "the contract [i.e., the secrecy agreements] takes the case out of the scope of the First Amendment; and to the extent the First Amendment *is* involved, the contract constitutes a waiver of the defendant's rights thereunder. It is these documents that the Court feels distinguish this case from *New York Times* v. *United States*, 403 U.S. 713 (1971), and render it no more than a usual dispute between an employer regarding the revelation of information obtained by that employee during his employment. Consequently, there is no prior restraint and no such heavy burden on the United States to show irreparable damage to the country as was imposed by *New York Times*." App., *infra*, p. 26a.

On May 17th, the defendant moved the Fourth Circuit for an expedited appeal from the issuance of the preliminary injunction[11] and the case was set for oral argument on May 31st.

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[10] The permanent injunction is set out in the Appendix, *infra*, p. 29a.

[11] The appeal from the issuance of the permanent injunction was later consolidated with this appeal.

More than three months later, the Fourth Circuit handed down its opinion essentially affirming the decision of the district court but remanding "for the purpose of revising the order to limit its reach to classified information . . ." App., *infra,* p. 17a.

The heart of its decision holds that " . . . the Government's need for secrecy in this area lends justification to a system of prior restraint against disclosure by employees and former employees of classified information obtained during the course of employment." App., *infra,* p. 13a. The opinion acknowledges—though only barely—the existence of *New York Times* v. *United States, supra,* but fails entirely to deal with the substance of that decision as it applies factually and conceptually to the case at bar.

REASONS FOR GRANTING THE WRIT

I.

The injunction violates the First Amendment.

1. By the terms of the injunction as modified by the opinion of the Court of Appeals, the defendant, a published author, must submit to the Central Intelligence Agency all writings, fiction or non-fiction, which "relate to or purport to relate to the Central Intelligence Agency, intelligence or intelligence activities, or intelligence sources or methods," before release to any other individual or corporation. The CIA is authorized within thirty days to withhold approval of "information which is classified and which has not been placed in the public domain by prior disclosure." Publication or disclosure by the defendant of any material so designated by the CIA is a contempt. Since the injunction forbids the defendant from disclosing

classified information not in the public domain "in any manner," he is also subject to a contempt prosecution for any spoken disclosure of such information if the CIA asserts it is classified.

Certiorari should be granted because this injunction is in direct conflict with this Court's decision in *New York Times* v. *United States*, 403 U.S. 713 (1971), for it imposes a prior restraint upon the defendant without the United States having been required to prove that disclosure of the information sought to be restrained would "surely result in direct, immediate and irreparable injury to the Nation or its people." 403 U.S. at 730 (Stewart, J., concurring).[12] The Court of Appeals, ignoring this Court's holding that "the Government '. . . carries a heavy burden of showing justification for the imposition of such a [prior] restraint,'" 403 U.S. at 714, adopted an entirely different standard. Under its standard, the only "burden" on the United States in this case is to show that information is classified. If so, it may prohibit its publication. That, we suggest, is no burden at all, for the instinct of government officers to classify indiscriminately is a notorious fact.[13]

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[12] The proof introduced at trial by the United States on the issue of injury is described in petitioner's separately filed sealed brief. By itself, it fails to meet the degree of proof required by Mr. Justice Stewart's formulation. Taken together with the proof proffered by the defense, which is also described in the sealed brief, its failure is all the more plain.

To the extent that the Court of Appeals considered the question of injury at all, it believed it was adequate if disclosure "may reasonably be thought to be inconsistent with the national interest." App., *infra*, p. 10a.

[13] According to testimony before the Foreign Operations and Government Information Subcommittee of the House Committee

The immediate effect of the Court of Appeals opinion is to permit the imposition of prior restraints on the government's mere assertion of classification, to nullify the *New York Times* decision, and to introduce a systematic scheme of censorship which will surely result in the denial of the fundamental right of the American people to be supplied with information about the conduct of their government.[14]

This case is different from the *New York Times* case, if it is different at all, by virtue only of the existence of the secrecy agreement executed by the defendant on being employed by the CIA in 1955.

Though the court below "readily agree[d]" with the defendant's persistent claim "that the First Amendment

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on Government Operations, 92nd Cong., 1st Sess. (1971), there are over 20 million classified documents in the Department of Defense alone (Statement of Deputy Assistant Secretary David Cooke, pt. 2, pp. 658-659), and over two million classified documents in the State Department. There was universal agreement among the expert witnesses at the hearings that the vast majority of such documents did not warrant secrecy classifications. For example, former United Nations Ambassador and Supreme Court Justice Arthur Goldberg stated: "I have read and prepared countless thousands of classified documents. In my experience, 75 percent of these documents should never have been classified in the first place; another 15 percent quickly outlived the need for secrecy; and only about 10 percent genuinely required restricted access over any significant period of time." Pt. 1, p. 12. And former Pentagon security specialist William Florence believed that "less than one-half of 1 percent of the different documents which bear currently assigned classification markings, actually contain information qualifying for even the lowest defense classification under Executive Order 10501." Pt. 1, p. 97.

[14] The Court of Appeals' standard is broader even than that thought necessary by the United States which alleged in its complaint that defendant's disclosures threatened to cause "grave and irreparable injury to the national defense and the conduct of foreign affairs." Complaint paras. 23 and 25.

limits the extent to which the United States, contractually or otherwise, may impose secrecy agreements upon its employees and enforce them with a system of prior restraint," it held that the First Amendment only "precludes such restraints with respect to information which is unclassified or officially disclosed. . . ." App., *infra*, p. 6a. But if the reach of a secrecy agreement is limited by the First Amendment, then we must consider why the standard applied in this case is such a radically diluted version of the standard applied in the *New York Times* case.

If government employees "are not relegated to a watered down version of constitutional rights," *Garrity* v. *New Jersey*, 385 U.S. 493, 500 (1967); see also *Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Epperson* v. *Arkansas*, 393 U.S. 97, 107 (1968), why then is Marchetti's right to publish different from that of the New York Times and the Washington Post? The only answer supplied by the Court of Appeals is that Marchetti was "contractually bound to respect" (App., *infra*, p. 6a) the 1955 secrecy agreement.[15] But given the decision in *New York Times* and the nation's abhorrence of prior restraints, this Court must confront the settled principle (ignored by the court below) that the government may not enforce contract provisions which are "barred by some controlling constitutional prohi-

[15] Quite apart from other considerations, the force of the secrecy agreement as a binding instrument is greatly weakened by the testimony of the CIA Director of Security at trial that other former CIA employees who had signed secrecy agreements identical to the one signed by Marchetti, had revealed classified information without provoking government sanctions. Furthermore, the unsealed response of Mr. Richard Helms to written interrogatories stated that "[o]f my own knowledge, former Agency employees who did not submit articles for publication include Thomas Braden, Miles Copeland, and Thomas McCoy." *Supra*, p. 11, n. 9.

bition." *King* v. *Smith*, 392 U.S. 309, 33n. 34 (1968). While private parties may agree by contract to waive their rights under the Constitution, when the government is a party to an agreement such waivers are unenforceable if they involve fundamental rights of free speech, e.g. *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967), *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), or the right to equal protection or due process of law, e.g., *Barrows* v. *Jackson*, 346 U.S. 249 (1953); *Shelley* v. *Kramer*, 334 U.S. 1 (1948). See also *Escalera* v. *New York City Housing Authority*, 425 F.2d 853 (2nd Cir. 1970). Consequently, no matter what the terms of a so-called secrecy agreement, the First Amendment prohibits their enforcement through the device of a prior restraint in the absence of proof that the threatened disclosures would "surely result in direct, immediate and irreparable injury to the Nation or its people." [16]

The Court must also confront the prospect that approval of an historically forbidden prior restraint on behalf of the CIA today, will yield an argument by the government tomorrow that similar restraints may be imposed against employees of the State Department and the Department of Defense (including members of the armed forces)[17] and, the

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[16] The sweep of the Court of Appeal's perspective on the issue in this case is demonstrated by its statement that "the law would probably imply a secrecy agreement had there been no formally expressed agreement . . ." App., *infra*, p. 13a. Thus the executed agreement in this case is, according to the Court of Appeals, merely a happy coincidence rather than the controlling feature of the case.

[17] The facts about the My Lai massacre, for example, were gathered almost entirely from former military personnel. See Hersh, S.M., My Lai 4 (New York 1970) and Haumer, R., One Morning in the War (New York 1970), both *passim*. Examples of other former government officials and employees who have supplied the public with critical information about the machinery of government abound. To approve the injunction here, immediately threatens those sources of information in the future.

day after tomorrow, against employees of the Departments of Health, Education and Welfare, and Housing and Urban Development. This case, therefore, has a critical bearing upon the continuing right of American citizens to know what their government is doing. See *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965); *New York Times* v. *United States*, *supra*.

The constitutional prohibition against prior restraints is of critical importance because a prior restraint, as opposed to a system of subsequent criminal sanctions, cuts off at the very source the ability of citizens to secure access to information. As Professor Thomas Emerson has noted:

> [A system of prior restraint] is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through criminal process; the procedures do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows. T. Emerson, *The System of Freedom of Expression*, 506 (1970).

It is for reasons such as these, as Mr. Justice Harlan observed in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 149 (1967), that this Court has "rejected all manner of prior restraints on publication [citing *Near* v. *Minnesota*, 283 U.S. 697 (1931)], despite strong arguments that if the material was unprotected the time of suppression was im-

material." See also *Bantam Books* v. *Sullivan*, 372 U.S. 58 (1963).

2. A majority of the court below held that the only review available to the defendant after CIA censorship, is a judicial determination whether material designated by the Agency is in fact classified, and whether it has come into the public domain. That is a constitutionally unacceptable standard in light of the compelling First Amendment aspect of this case. It allows the CIA a completely free hand to designate material as classified and surrenders any judicial responsibility for determining whether the designation is reasonable or even capricious. This is especially remarkable in light of the testimony by the CIA's Deputy Director that he did not use E.O. 10501 as a guide for classifying documents because "We could not possibly operate on that basis" (Tr. 66). If the CIA is to have the power of censorship, this Court must decide whether subsequent judicial review shall inquire into the basis for classification.

3. Though the defendant maintains that his case is as clearly outside any narrow exception to the rule against prior restraints as were the Pentagon Papers, if the CIA is to have the power to censor at all, the terms of the injunction, which allow the Agency thirty days in which to exercise its censor's perogatives, are too broad.

In *Freedman* v. *Maryland*, 380 U.S. 51 (1965), a state procedure for restraining allegedly obscene matter—similar to the proposed CIA procedure—was struck down because it did not satisfy minimal criteria restricting the state's power to exercise censorship. The Court in *Freedman* held that a constitutionally acceptable procedure must "assure

a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous" administrative restraint. 380 U.S. at 59. A model, said the Court, was to be found in the statute upheld in *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436 (1957), which required a hearing on the issue of obscenity one day after joinder of issue, and a judicial decision within two days after termination of the hearing. The procedure under the injunction in the case at bar, on the other hand, creates an intolerable risk of delay in the administrative determination by requiring the defendant to submit his writings thirty days prior to disclosing them to any third party and requiring him to seek judicial review upon completion of CIA scrutiny.

The failure of the terms of the injunction to measure up to the minimum standards of the *Freedman* case is all the more inimical to First Amendment rights in this case where not obscenity but political speech is being regulated. As this Court observed in *Carroll* v. *Princess Anne,* 393 U.S. 175, 182 (1968):

> The present case involves a . . . 'political' speech in which the element of timeliness may be important. As Mr. Justice Harlan, dissenting in A Quantity of Books v. Kansas, pointed out, 'speaking of political and social expression':
>
> > 'It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. A delay of even a day or two may be of crucial importance in some instances. On the other hand, the subject of sex is a constant but rarely particularly topical interest.' 378 U.S. at 224.

II.

The federal courts have no jurisdiction to entertain the Government's complaint.

Since Congress has never authorized extraction of the secrecy agreements in this case or suit to enforce them, the Executive Department relied upon two bases to confer jurisdiction upon the federal courts:

(1) the government's inherent power to utilize the courts to "protect the interests of the United States," and

(2) a district court's authority to fashion implied, civil remedies (a) from 50 U.S.C. §403(d)(3) which declares that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure," (b) from 5 U.S.C. §552(b)(1), which exempts from mandatory disclosure under the Freedom of Information Act "matter specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy . . . ," and (c) from the criminal prohibitions contained in the Espionage Act, 18 U.S.C. §793(e).

The court below, relying on the inherent power theory, held that "Jurisdiction arises from the presence of the United States as a party. 28 U.S.C. §1345 . . . Standing arises from the government's interest in protecting the national security [citing *In Re Debs*, 158 U.S. 564 (1895)]."

Almost every one of the relatively few cases in which the Supreme Court has relied on the *Debs* principle, thus al-

lowing the United States to seek injunctive relief despite the absence of a specific jurisdictional statute, has not involved sweeping claims such as the suppression of speech, but limited ones such as the elimination of obstructions to the modes of interstate commerce such as navigable rivers. See, e.g., *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191 (1967); *United States* v. *Republic Steel*, 362 U.S. 482 (1960); *Sanitary District of Chicago* v. *United States*, 266 U.S. 405 (1925) (all involving navigable waterways). More recently, lower courts have held this principle to encompass those burdens on interstate commerce imposed by racial discrimination in transportation facilities. See, e.g., *United States* v. *City of Jackson*, 318 F.2d 1 (5th Cir. 1963); *United States* v. *City of Shreveport*, 210 F. Supp. 36 (W.D. La. 1962).

Secondly, the *Debs* principle has been limited to areas where there were comprehensive and remedial federal statutory arrangements, and where a clear legislative purpose would be served by allowing the United States to seek civil relief of a specific kind. See, e.g., *Sullivan* v. *United States*, 395 U.S. 169 (1969); *Wyandotte Transportation Co.* v. *United States*, *supra*; *United States* v. *Arlington County*, 326 F.2d 929 (4th Cir. 1964) (both involving the Soldiers' and Sailors' Civil Relief Act).

Aside from the *New York Times* case, research has disclosed no case where an inherent or non-statutory cause of action was claimed by the Executive Department as a basis for injunctive relief where First Amendment rights were interposed by the defendant. The absence of such cases is readily understandable. First, any such attempt to enjoin arguably protected First Amendment activity runs immediately afoul of the clear prohibition on prior re-

straints. Moreover, the values embodied in the First Amendment are themselves affected with an overriding public interest as compelling as the Executive Department's claim of national security. For unlike most other constitutional protections, the safeguards of the First Amendment, particularly the guarantee of a free press, were designed to insure the proper functioning of our political democracy.

The granting of an inherent, nonstatutory cause of action may be acceptable to support an injunction against depositing waste in a navigable stream. But where the First Amendment and the fundamental social policies it embodies are interposed, they constitute a limiting principle on the application of such an elusive and open-ended concept. As Mr. Justice White concluded in the *New York Times* case,

> At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press. 29 L.Ed. 2d at 835.[18]

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[18] Limits upon the general power to seek injunctions is made all the more clear by the fact that in one limited and carefully defined area Congress explicitly granted authority to the Executive to apply for injunctive relief similar to that which was granted by the district court. 42 U.S.C. §2280. By that section the Attorney General is authorized on the recommendation of the Atomic Energy Commission to make an application to a United States District Court for an injunction against the threatened disclosure of atomic secrets. This statutory basis for an injunction stands as the sole exception to the use only of criminal sanctions for the unauthorized disclosure of national security information. See also *New York Times* v. *United States*, *supra* at 403, n. 3 (Marshall, J., concurring).

III.

The Government has exercised an intolerable degree of control over the defendant's preparation of his defense, thus creating a denial of due process and a high potential for the miscarriage of justice.

The Government in this case hailed the defendant into court after securing an *ex parte* prior restraint of his First Amendment rights and then proceeded to interfere substantially with the preparation of his defense by superimposing on an adequate protective order issued by the district court and enforceable by the threat of contempt proceedings, a security clearance procedure entirely within its control. The procedure required that all defense attorneys, assistants, clerical personnel, and prospective witnesses be cleared for access to classified information before they could learn the facts of the case. The delays and uncertainties resulting from this superfluous and highly prejudicial procedure necessitated a two week postponement of the trial on the preliminary and permanent injunctions, thus requiring the defendant to consent to an inordinate continuation of the temporary restraining order. The product of this stringent security procedure was a thirty-day prior restraint even before a hearing on the merits of the case.

In this case access to the sealed affidavit and exhibits was a *sine qua non* to the preparation of the defense. Nevertheless, access to the defendant, his attorneys and witnesses was so limited and conditioned that the defense was seriously impeded. Several illustrations will suffice. Not until the conclusion of the hearing on the merits were

the defendant's attorneys provided a copy of the Karamessines affidavit. Until that time they had to rely on their memories to treat the plaintiff's specific factual allegations. Two witnesses submitted for security clearance were not cleared. One witness, Professor Falk, whose clearance was pending for more than one week before it was denied, was subsequently granted access to the sealed materials only after a judicial determination that the denial was "unreasonable" within the terms of the Fourth Circuit's protective order entered on April 26, 1972. Several days after the filing of the case the Government granted clearance to one of defendant's attorneys; it consented to clear three others only upon the defendant's application to Judge Winter of the Fourth Circuit and the entering of a consent order by the District Court. Defendant's local attorney in the Eastern District of Virginia was not cleared until four days before the trial on the preliminary and permanent injunctions, more than a week after his application for clearance.

These severe impediments to the adequate preparation of the defense cannot be justified on any legal basis that the Government might advance. Indeed, the Government was not faced with a Hobson's choice of either disclosing that which it claimed should be kept secret or dropping its case to avoid disclosure, although the defendant maintains that it should have been forced to make such a choice. Cf. *Mitchell* v. *Bass*, 252 F.2d 513 (8th Cir. 1958). Here, the Government had been given, over the defendant's objection, the full protection of a judicial order binding the parties, attorneys and witnesses to non-disclosure. Under these circumstances the Government's interference with the preparation of the defense is a denial of due process

and this Court should decide whether such control over the defense case is permissible.[19]

Finally, the trial court on May 5, 1972 granted the Government's motion for an order denying the defendant's request for inspection of the sealed transcript of the proceedings in *New York Times Co.* v. *United States*, 403 U.S. 713 (1972). The effect of this order was to deny the defendant access to the record of the only case in which standards were devised for determining the scope of the extraordinary exception to the rule against prior restraints which have been applied to the defendant.

[19] The trial judge in *United States* v. *Russo and Ellsberg*, No. 9373 (WMB)—CD (C.D. Calif. 1972), a criminal proceeding involving sealed national security documents, did not permit the Government to subject the defendants, their attorneys and witnesses, to a security clearance procedure, on the ground that a judicial protective order was adequate to secure the Government's interest in non-disclosure.

CONCLUSION

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,

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September 21, 1972

APPENDIX

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Opinion in the United States Court of Appeals

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 72-1586

UNITED STATES OF AMERICA,

Appellee,

v.

VICTOR L. MARTINETTI,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA
ALBERT V. BRYAN, JR., DISTRICT JUDGE

Argued May 31, 1972 Decided September 11, 1972

APPENDIX

Opinion in the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 72-1586

UNITED STATES OF AMERICA,

Appellee,

versus

VICTOR L. MARCHETTI,

Appellant.

Amicus Curiae

ASSOCIATION OF AMERICAN PUBLISHERS, INC.
AUTHORS LEAGUE OF AMERICA, INC.

No. 72-1589

UNITED STATES OF AMERICA,

Appellee,

versus

VICTOR L. MARCHETTI,

Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA
ALBERT V. BRYAN, JR., DISTRICT JUDGE

Argued May 31, 1972 Decided September 11, 1972

HAYNSWORTH, *Chief Judge*:

The question for decision is the enforceability of a secrecy agreement exacted by the government, in its capacity as employer, from an employee of the Central Intelligence Agency. Marchetti contends that his First Amendment rights foreclose any prior restraint upon him in carrying out his purpose to write and publish what he pleases about the Agency and its operations. Relying on a secrecy agreement signed by Marchetti when he became an employee of the Agency and on a secrecy oath signed by Marchetti when he resigned from the Agency, the District Court ordered Marchetti to submit to the Agency thirty days in advance of release to any person or corporation, any writing, fictional or non-fictional, relating to the Agency or to intelligence and ordering him not to release any writing relating to the Agency or to intelligence without prior authorization from the Director of Central Intelligence or from his designated representative. Marchetti was also ordered to return any writing or other property of the United States he had acquired while employed by the Agency.

We affirm the substance of the decision below, limiting the order, however to the language of the secrecy agreement Marchetti signed when he joined the Agency. We find the contract constitutional and otherwise reasonable and lawful.

This action was initiated on April 18, 1972, when the United States was granted an ex parte temporary restraining order against Marchetti by the District Court. A hearing was set for April 28, 1972, on the Government's motion for a preliminary injunction. On April 21, 1972, Marchetti moved to have the District Court dissolve the temporary

restraining order. After that motion had been denied, an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) was sought in this court. After oral argument, this panel denied the request for an interlocutory appeal and for writs of mandamus and prohibition, but directed the United States not to interfere with prospective witnesses for Marchetti. Counsel for Marchetti subsequently sought a postponement until May 14, 1972 of the hearing on the preliminary injunction. In granting this postponement, the District Court ordered the trial on the merits consolidated with the hearing on the motion for the preliminary injunction. The trial, held on May 15, was followed on May 19, 1972 by the District Court's Memorandum Opinion and Order granting the injunction sought by the United States.

Marchetti was an employee of the Central Intelligence Agency from October 3, 1955 until he resigned effective September 5, 1969. The positions he held included the post of Executive Assistant to the Deputy Director. When he joined the Agency, he signed a secrecy agreement promising not to divulge in any way any classified information, intelligence or knowledge, except in the performance of his official duties, unless specifically authorized in writing by the Director or his authorized representative.[1] Marchetti

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[1] The relevant provisions of the agreement are:

"SECRECY AGREEMENT

1. I, Victor L. Marchetti, understand that by virtue of my duties in the Central Intelligence Agency, I may be or have been the recipient of information and intelligence which concerns the present and future security of the United States. This information and intelligence, together with the methods of collecting and handling it, are classified according to security standards set by the United States Government. I have read and understand the provisions of the espionage laws, Act of June 25, 1948, as amended, concerning the disclosure of in-

also signed a secrecy oath when he resigned from the Agency in 1969.[2]

After his resignation, Marchetti published a novel, entitled *The Rope Dancer*, concerning an agency called the

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formation relating to the National Defense and I am familiar with the penalties provided for violation thereof.

2. I acknowledge, that I do not now, nor shall I ever possess any right, interest, title or claim, in or to any of the information or intelligence or any method of collecting or handling it, which has come or shall come to my attention by virtue of my connection with the Central Intelligence Agency, but shall always recognize the property right of the United States of America, in and to such matters.

3. I do solemnly swear that I will never divulge, publish or reveal either by word, conduct, or by any other means, any classified information, intelligence or knowledge except in the performance of my official duties and in accordance with the laws of the United States, unless specifically authorized in writing, in each case, by the Director of Central Intelligence or his authorized representatives. * * * "

[2] The relevant provisions of the oath are:

"SECRECY OATH

I, ..., am about to terminate my association with the Central Intelligence Agency. I realize that, by virtue of my duties with that Agency, I have been the recipient of information and intelligence which concerns the present and future security of the United States of America. I am aware that the unauthorized disclosure of such information is prohibited by the Espionage Laws (18 USC secs. 793 and 794), and by the National Security Act of 1947 which specifically requires the protection of intelligence sources and methods from unauthorized disclosure. Accordingly, I SOLEMNLY SWEAR, WITHOUT MENTAL RESERVATION OR PURPOSE OF EVASION, AND IN THE ABSENCE OF DURESS, AS FOLLOWS:

1. I will never divulge, publish, or reveal by writing, word, conduct, or otherwise, any information relating to the national defense and security and particularly information of this nature relating to intelligence sources, methods and operations, and specifically Central Intelligence Agency operations, sources, methods, personnel, fiscal data, or security measures to anyone, including but not limited to, any future governmental or private employer, private citizen, or other Government employee

"National Intelligence Agency." Marchetti has also published an article in the April 3, 1972 issue of the magazine, *The Nation*. Entitled "CIA: The President's Loyal Tool," the article criticized some policies and practices of the Agency. In March, 1972, Marchetti submitted to *Esquire* magazine and to six other publishers an article in which he reports some of his experiences as an agent. According to the United States, this article contains classified information concerning intelligence sources, methods and operations. Marchetti has appeared on television and radio shows and has given interviews to the press. He has submitted to a publishing house an outline of a book he proposes to write about his intelligence experiences.

I

Jurisdiction

Jurisdiction arises from the presence of the United States as a party. 28 U.S.C. § 1345. "The government can sue even if there is no specific authorization. In such cases, however, it must have some interest to be vindicated sufficient to give it standing." C. A. Wright, Federal Courts 68 (2d ed. 1970), ch. 3, § 22. Standing arises from the government's interest in protecting the national security.[2]

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or official without the express written consent of the Director of Central Intelligence or his authorized representative.

• • •

3. I do not have any documents or materials in my possession, classified or unclassified, which are the property of, or in custodial responsibility of the Central Intelligence Agency, having come into my possession as a result of my duties with the Central Intelligence Agency, or otherwise. • • • "

[2] Cf. *In re Debs*, 158 U.S. 564, 584:

"Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any

II

The Freedom of Speech and of the Press are not Absolute

Marchetti claims that the present injunction is barred by the Supreme Court decision in the Pentagon Papers case because the Government has failed to meet the very heavy burden against any system of prior restraints on expression. *New York Times Co.* v. *United States*, 403 U.S. 713, 714.

We readily agree with Marchetti that the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees and enforce them with a system of prior censorship. It precludes such restraints with respect to information which is unclassified or officially disclosed, but we are here concerned with secret information touching upon the national defense and the conduct of foreign affairs, acquired by Marchetti while in a position of trust and confidence and contractually bound to respect it.

In order to protect freedom of speech and of the press, the First Amendment has been applied beyond its express terms, which were directed solely to Congress:

> "The first amendment provides that 'Congress shall make no law * * * abridging the freedom * * * of the press,' and there has been common disposition

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proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the mattter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court."

to apply the amendment to the Executive and the courts as well. [Citing: Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 143-44 (Black, J., concurring), 199 (Reed, J., dissenting) (1951); Watkins v. United States, 354 U.S. 178, 188 (1957); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943). *See also* Beauharnais v. Illinois, 343 U.S. 250, 386 (Douglas, J., dissenting) (1952); Reid v. Covert, 354 U.S. 1, 17 (1957).] But the import of the first amendment is as uncertain and undefined in regard to the freedom of the Press as to the other rights and freedoms that it protects, and, indeed, the courts have had far fewer occasions to define the freedom of the Press, than, say, freedom of speech." Henkin, The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers, 120 U. Pa. L. Rev. 271, 277 (1971).

Nonetheless, "[f]ree speech is not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights." Bridges v. California, 314 U.S. 282 (Frankfurter, J., dissenting).[4] In applying the First Amendment to actions taken by the judicial and executive branches, the Supreme Court has followed a flexible ap-

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[4] "Because freedom of public expression alone assures the unfolding of truth, it is indispensable to the democratic process. But even that freedom is not an absolute and is not predetermined. By a doctrinaire overstatement of its scope and by giving it an illusory absolute appearance, there is danger of thwarting the free choice and the responsibility of exercising it which are basic to a democratic society."

Bridges v. *California*, 314 U.S. 252, 293 (Frankfurter, J., dissenting). *See also Near* v. *Minnesota*, 283 U.S. 697, 708, "Liberty of speech, and of the press, is * * * not an absolute right, and the state may punish its abuse."

proach. As Mr. Justice Brennan wrote in *Roth* v. *United States*, 354 U.S. 476, 483:

> "[I]t is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. *Beauharnais* v. *Ill.*, 343 U.S. 250, 266. At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press."

Threats and bribes are not protected simply because they are written or spoken; extortion is a crime although it is verbal. The Supreme Court has also upheld the Labor Board's attempt to protect employees from spoken coercion by employers. *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 616-619. The "government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Near* v. *Minnesota*, 283 U.S. 697, 716. Cf. *Pennsylvania* v. *Nelson*, 350 U.S. 497. This flexible approach toward the executive and judicial branch is warranted not only because they are omitted from the express language of the First Amendment, but also because they lack legislative capacity to establish a pervasive system of censorship. This case itself illustrates the point that the executive and judicial branches proceed on a case by case basis, the executive branch being dependent on the judiciary to restrict unwarranted disclosures.

An earlier case upholding a government request to enjoin publication involved the Valachi papers, written while Valachi was in prison. The United States brought an action to obtain a permanent injunction requiring Maas, the editor of Valachi's manuscript, to comply with a "Memorandum of Understanding" which required the approval of the manuscript by the Department of Justice prior to publication or dissemination. The parties entered this agreement because the Attorney General had promulgated, pursuant to 18 U.S.C. §§4001, 4042, a regulation that no manuscript prepared by a federal prisoner should be approved for publication "if it deals with the life history or the criminal career of the writer." Valachi and his attorney had signed the Memorandum, but Maas had not, signing instead another agreement to which the Department of Justice was not a party. The District Court granted the United States a preliminary injunction which was upheld by the Court of Appeals based on the broad discretion of the District Court in considering preliminary injunctions. *Maas* v. *United States,* D. C. Cir., 371 F.2d 348.

This Court recently granted the government declaratory relief against a newspaper publisher who had published a racially discriminatory advertisement for the rental of a room in a private house, in violation of the 1968 Civil Rights Act. The Court denied the defendant's claim that freedom of the press was being abridged, concluding that the act affected the press only in a commercial context and not in the dissemination of ideas. *United States* v. *Hunter,* 4 Cir., 459 F.2d 205, 211-213.

III

The Government has a Right to Secrecy

Gathering intelligence information and the other activities of the Agency, including clandestine affairs against other nations, are all within the President's constitutional responsibility for the security of the Nation as the Chief Executive and as Commander in Chief of our Armed Forces. Const., art. II, § 2. Citizens have the right to criticize the conduct of our foreign affairs, but the Government also has the right and the duty to strive for internal secrecy about the conduct of governmental affairs in areas in which disclosure may reasonably be thought to be inconsistent with the national interest.

The Supreme Court recognized the need for secrecy in government in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 where it said that the President

> "has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results."

A similar view was expressed in *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111:

> "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world."

In another case the government was granted an injunction to enforce an agreement with a private contractor who claimed the right to divulge the details of a torpedo to other potential customers. In *E. W. Bliss Co.* v. *United States*, 248 U.S. 37, 48, the Supreme Court quoted with approval from the opinion of the Second Circuit in that case:

> "'The nature of the services rendered was such that secrecy might almost be implied. It is difficult to imagine a nation giving to one of its citizens contracts to manufacture implements necessary to the national defense and permitting that citizen to disclose the construction of such implement or sell it to another nation. The very nature of the service makes the construction urged by the defendant untenable.'"

Although the First Amendment protects criticism of the government, nothing in the Constitution requires the government to divulge information:

> "From our national beginnings, the Government of the United States has asserted the right to conceal and, therefore, in practical effect not to let the people know. Secrecy governed the deliberations in Philadelphia in 1787. Some need for secrecy was expressly recognized in the Constitution: in providing for publication of a journal of each House of Congress, it excepted 'such parts as may in their judgment require secrecy.' The occasional need for secrecy underlay some of the dispositions of the Constitution: the power to conduct foreign relations was given to the Executive rather than to Congress, and a part in making treaties to the less numerous Senate rather than to the House.

Presidents from Washington to Nixon have asserted 'executive privilege' to withhold information from Congress. And Congresses and congressional committees have recognized the 'right,' the propriety, the need for some executive nondisclosure, even to them: since 1791 Congress, in requesting reports from Executive Departments, has asked the State Department to report only what in the President's judgment was 'not incompatible with the public interest.' Modern Congresses have recognized the Executive's classification system and provided for its enforcement, to some extent by criminal penalties. The Supreme Court, too, has repeatedly recognized the need for some secrecy in executive activities. For its own part, Congress has often claimed the need to conceal: the Senate in particular (especially in executive session), and committees and subcommittees of both Houses, have often maintained secrecy. The courts, too, often insist on the confidentiality of deliberations in the jury room or in judicial chambers. The most confidential proceeding in all of government is probably the conference of the Justices of the Supreme Court." Henkin, The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers, 120 U. Pa. L. Rev. 271, 273-74 (1971).[5]

[5] *Cf.* 5 U.S.C. § 552(b)(1) exempting from mandatory disclosure under the Freedom of Information Act "matter specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy • • • ." Executive Order 10501 has established a system of classifying documents as "Top Secret", "Secret" or "Classified" depending on the effect of disclosure on the national defense and the conduct of the nation's affairs.

IV

Secrecy Agreements with Employees Provide a Reasonable Means for Government Agencies to Protect Internal Secrets

Congress has imposed on the Director of Central Intelligence the responsibility for protecting intelligence sources and methods. 50 U.S.C. § 403 (d)(3). In attempting to comply with this duty, the Agency requires its employees as a condition of employment to sign a secrecy agreement, and such agreements are entirely appropriate to a program in implementation of the congressional direction of secrecy. Marchetti, of course, could have refused to sign, but then he would not have been employed, and he would not have been given access to the classified information he may now want to broadcast.

Confidentiality inheres in the situation and the relationship of the parties. Since information highly sensitive to the conduct of foreign affairs and the national defense was involved, the law would probably imply a secrecy agreement had there been no formally expressed agreement, but it certainly lends a high degree of reasonableness to the contract in its protection of classified information from unauthorized disclosure.

Moreover, the Government's need for secrecy in this area lends justification to a system of prior restraint against disclosure by employees and former employees of classified information obtained during the course of employment. One may speculate that ordinary criminal sanctions might suffice to prevent unauthorized disclosure of such information, but the risk of harm from disclosure is so great and maintenance of the confidentiality of the information so neces-

sary that greater and more positive assurance is warranted. Some prior restraints in some circumstances are approvable of course. See *Freedman* v. *Maryland*, 380 U.S. 51.

V

Marchetti's Rights

As we have said, however, Marchetti by accepting employment with the CIA and by signing a secrecy agreement did not surrender his First Amendment right of free speech. The agreement is enforceable only because it is not a violation of those rights. We would decline enforcement of the secrecy oath signed when he left the employment of the CIA to the extent that it purports to prevent disclosure of unclassified information, for, to that extent, the oath would be in contravention of his First Amendment rights.[6]

Thus Marchetti retains the right to speak and write about the CIA and its operations, and to criticize it as any other citizen may, but he may not disclose classified information obtained by him during the course of his employment which is not already in the public domain.

Because we are dealing with a prior restraint upon speech, we think that the CIA must act promptly to approve or disapprove any material which may be submitted to it by Marchetti. Undue delay would impair the reasonableness of the restraint, and that reasonableness is to be maintained if the restraint is to be enforced. We should think that, in all events, the maximum period for responding

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[6] There was no apparent consideration for the secrecy oath, so that it would be, generally, unenforceable on that ground. The oath has the support of the moral force underlying solemn oaths, but it added nothing to the Government's arsenal of legal rights in the context of this proceeding.

after the submission of material for approval should not exceed thirty days.

Furthermore, since First Amendment rights are involved, we think Marchetti would be entitled to judicial review of any action by the CIA disapproving publication of the material. Some such review would seem essential to the enforcement of the prior restraint imposed upon Marchetti and other former employees. See *Freedman* v. *Maryland*, 380 U.S. 51. Because of the sensitivity of the area and confidentiality of the relationship in which the information was obtained, however, we find no reason to impose the burden of obtaining judicial review upon the CIA. It ought to be on Marchetti.

Indeed, in most instances, there ought to be no practical reason for judicial review since, because of its limited nature, there would be only narrow areas for possible disagreement.

The Constitution in Article II § 2 confers broad powers upon the President in the conduct of relations with foreign states and in the conduct of the national defense. The CIA is one of the executive agencies whose activities are closely related to the conduct of foreign affairs and to the national defense. Its operations, generally, are an executive function beyond the control of the judicial power. If in the conduct of its operations the need for secrecy requires a system of classification of documents and information, the process of classification is part of the executive function beyond the scope of judicial review. See *Oetjen* v. *Central Leather Co.*, 246 U.S. 297; *United States* v. *Belmont*, 301 U.S. 324; *Zemel* v. *Rusk*, 381 U.S. 1.

There is a practical reason for avoidance of judicial review of secrecy classifications. The significance of one item

of information may frequently depend upon knowledge of many other items of information. What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context. The courts, of course, are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications in that area.

Information, though classified, may have been publicly disclosed. If it has been, Marchetti should have as much right as anyone else to republish it. Rumor and speculation are not the equivalent of prior disclosure, however, and the presence of that kind of surmise should be no reason for avoidance of restraints upon confirmation from one in a position to know officially.

The issues upon judicial review would seem to be simply whether or not the information was classified and, if so, whether or not, by prior disclosure, it had come into the public domain.

VI

Conclusion

For the stated reasons, our conclusion is that the secrecy agreement executed by Marchetti at the commencement of his employment was not in derogation of Marchetti's constitutional rights. Its provision for submission of material to the CIA for approval prior to publication is enforceable, provided the CIA acts promptly upon such submissions and withholds approval of publication only of information which is classified and which has not been placed in the public domain by prior disclosure.

Generally, therefore, we approve the injunctive order issued by the District Court. The case will be remanded, however, for the purpose of revising the order to limit its reach to classified information and for the conduct of such further proceedings as may be necessary if Marchetti contends that the CIA wrongfully withheld approval of the publication of any information under the standards we have laid down.

Affirmed and remanded.

CRAVEN, *Circuit Judge*, concurring:

I agree that "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1917).

I concur in the opinion of the court except for the statement that the classification of documents and information by the executive is not subject to judicial review. Because the national security may be involved and because of the expertise of the executive, I would resolve any doubt about the reasonableness of a classification in favor of the government. If the burden were put upon one who assails the classification, and surely it ought to be, much of the difficulty envisioned in the court's opinion would presumably disappear. Indeed, I would not object to a presumption of reasonableness, and a requirement that the assailant demonstrate by clear and convincing evidence that a classification is arbitrary and capricious before it may be invalidated.

But however difficult the adjudication of the reasonableness of a secrecy classification, I cannot subscribe to a flat rule that it may never be attempted. The "right to know" is in a period of gestation. I think that the people will increasingly insist upon knowing what their government is doing and that, because this knowledge is vital to government by the people, the "right to know" will grow. I am not yet ready to foreclose any inquiry into whether or not secrecy classifications are reasonable. To protect those that are does not require that we also protect the frivolous and the absurd.

Other than my doubt about the insulation of a classification system from judicial review, I fully concur in the opinion of the court.

Memorandum Opinion and Order

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

Civil Action No. 179-72-A

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

VICTOR L. MARCHETTI,

Defendant.

The United States has filed a complaint seeking to enforce specific performance of a contract it made with the defendant. The complaint asks for a permanent injunction against disclosure by the defendant, his agents, servants, or employees, assigns, and all others in concert or participation with him, of information obtained by him while an employee of the Central Intelligence Agency (CIA), all in violation of that contract.

The controlling issue in the case, as set forth in defendant's trial brief (p. 16), is "whether the facts are to be judged according to the First Amendment doctrine or according to the common law of contracts." It is the Court's view that it should be viewed according to the latter.

Upon beginning his employment with the United States, the defendant executed the following two secrecy agreements:

"SECRECY AGREEMENT

23 March 1955
Date

1. I am aware of the fact that the Central Intelligence Agency by reason of the sensitive nature of its work, must observe very strict security measures.

2. I agree to honor the requests of the Central Intelligence Agency relative to my application for employment or rendition of services whether it be accepted or rejected.

3. I agree not to inform anyone that I am being considered for a position in the Central Intelligence Agency, unless specifically authorized by a representative of the Central Intelligence Agency.

4. I agree not to disclose processing procedures I have observed in the Central Intelligence Agency.

5. I agree not to discuss by name or otherwise, any individuals with whom I have talked in the course of my application for employment to the Central Intelligence Agency.

/s/ VICTOR L. MARCHETTI
Signature

/s/ WILLIAM E. GREENIP
Witness"

"SECRECY AGREEMENT

1. I, Victor L. Marchetti, understand that by virtue of my duties in the Central Intelligence Agency, I may be or have been the recipient of information and intelligence which concerns the present and future security of the United States. This information and intelligence, together with the methods of collecting and handling it, are classified according to security standards set by the United States Government. I have read and understand the provisions of the espionage laws, Act of June 25, 1948, as amended, concerning the disclosure of information relating to the National Defense and I am familiar with the penalties provided for violation thereof.

2. I acknowledge, that I do not now, nor shall I ever possess any right, interest, title or claim, in or to any of the information or intelligence or any method of collecting or handling it, which has come or shall come to my attention by virtue of my connection with the Central Intelligence Agency, but shall always recognize the property right of the United States of America, in and to such matters.

3. I do solemnly swear that I will never divulge, publish or reveal either by word, conduct, or by any other means, any classified information, intelligence or knowledge except in the performance of my official duties and in accordance with the laws of the United States, unless specifically authorized in writing, in each case, by the Director of Central Intelligence or his authorized representatives.

4. I will at all times comply strictly with the Central Intelligence Agency Security Regulations and appendices thereto, which I have read and understand.

5. I understand that no change in my assignment within the Central Intelligence Agency will relieve me of my obligation under this oath and that the provisions of this oath will remain equally binding on me after the termination of my services with the Central Intelligence Agency.

6. I take this obligation freely, without any mental reservation or purpose of evasion.

IN WITNESS WHEREOF, I have set my hand and seal this 3 day of Oct. 1955.

/s/ VICTOR L. MARCHETTI (Seal)"

When he terminated his employment in 1969, he executed the following document:

"SECRECY OATH

I, ..., am about to terminate my association with the Central Intelligence Agency. I realize that, by virtue of my duties with that Agency, I have been the recipient of information and intelligence which concerns the present and future security of the United States of America. I am aware that the unauthorized disclosure of such information is prohibited by the Espionage Laws (18 USC secs. 793 and 794), and by the National Security Act of 1947 which specifically requires the protection of intelligence sources and methods from unauthorized disclosure. Accordingly, I SOLEMNLY SWEAR, WITHOUT MENTAL RESERVATION OR PURPOSE OF

EVASION, AND IN THE ABSENCE OF DURESS, AS FOLLOWS:

1. I will never divulge, publish, or reveal by writing, word, conduct, or otherwise, any information relating to the national defense and security and particularly information of this nature relating to intelligence sources, methods and operations, and specifically Central Intelligence Agency operations, sources, methods, personnel, fiscal data, or security measures to anyone, including but not limited to, any future governmental or private employer, private citizen, or other Government employee or official without the express written consent of the Director of Central Intelligence or his authorized representative.

2. I have been invited to submit in writing any monetary claims which I may have against CIA or the United States Government which may in any way necessitate the disclosure of information described herein. I have been advised that any such claims will receive full legal consideration. In the event, however, that I am not satisfied with the decisions of CIA concerning any present or future claims I may submit, I will not take any other action to obtain satisfaction without prior written notice to CIA, and then only in accordance with such legal and security advice as CIA will promptly furnish me.

3. I do not have any documents or materials in my possession, classified or unclassified, which are the property of, or in custodial responsibility of the Central Intelligence Agency, having come into my possession as a result of my duties with the Central Intelligence Agency, or otherwise.

4. During my exit processing and during my period of employment with the Central Intelligence Agency I have been given an opportunity to report all information about the Agency, its personnel, and its operations which I consider should receive official cognizance. Hence, I am not aware of any information, which it is my duty in the national interest to disclose to the Central Intelligence Agency, nor am I aware of any violations or breaches of security which I have not officially reported, except as set forth on the reverse side of this sheet or on other attachments.

5. I have been advised that in the event I am called upon by the properly constituted authorities to testify or provide information which I am pledged hereby not to disclose, I will notify CIA immediately; I will also advise said authorities of my secrecy commitments to the United States Government and will request that my right or need to testify be established before I am required to do so.

6. I am aware of the provisions and penalties of the Espionage Laws, Act of June 25, 1948 (18 USC secs. 793 and 794) and am fully aware that any violation on my part of certain matters sworn to by me under this oath may subject me to prosecution under the terms of that Act, and that violation of other portions of this oath are subject to appropriate action, including such dissemination of the violation as the circumstances warrant.

I have read and understand the contents of this oath and voluntarily affix my signature hereto with the full knowledge that this oath was executed for the mutual benefit of myself and the United States Government,

and that it will be retained in the files of the Central Intelligence Agency for its future use or for reference by me at any time in the future that I may be requested or ordered to testify or disclose any of the matters included within the scope of this oath.

IN WITNESS WHEREOF, I have set my hand and seal this 2 Sep 1969.

/s/ VICTOR L. MARCHETTI (Seal)
Signature"

Subsequent to termination of his employment the defendant authored an article entitled "Twilight of the Spooks." He sent this article to a magazine publisher. Subsequently he visited and submitted the manuscript to six other publishers. With one of these he ultimately signed a contract for its publication and received an advance on royalties. The article has never been submitted to the CIA, nor has consent of its Director or his authorized representative been obtained for the revelations contained in the article.

Specifically the Court finds that at least five of the items mentioned in the Karamessines affidavit and testified to by Karamessines on the stand as appearing in the defendant's article "Twilight of the Spooks," were classified; and at least three items which were taped for television interviews also fit that category. Attempts were made by the defendant to show that the material was improperly classified; that it was information which was publicly known anyway; and that, contrary to the Karamessines affidavit and testimony, revelations of the type made by the defendant would *not* compromise the security of the United States or endanger its intelligence operations. Objections to these attempts were uniformly sustained by the Court during

trial. It was the view of the Court at trial, and still is, that it is not the role of the Court to determine whether material should be classified or whether, even if classified, its revelation is immaterial. Nor should the Court make a determination as to the validity of the CIA's judgment on the compromise *vel non* of this country's security and intelligence operations. By contract the defendant has relegated that decision to the CIA. As pointed out in the testimony of Karamessines, on the subject of whether the information is already public, it is one thing to have unconfirmed report, rumor, suspicion and speculation as the source of such information. It is quite another thing to have such information revealed by a person who bears the credentials of a former CIA employee. Even though the information is incorrect, it in some instances was sufficiently close to the truth to be damaging. But damaging or not, it was information obtained by the defendant as a result of his employment with CIA, and consequently its revelation is restricted.

In the opinion of the Court the contract takes the case out of the scope of the First Amendment; and, to the extent the First Amendment *is* involved, the contract constitutes a waiver of the defendant's rights thereunder. It is these documents that the Court feels distinguish this case from *New York Times Co.* v. *United States*, 403 U.S. 713 (1971), and render it no more than a usual dispute between an employer regarding the revelation of information obtained by that employee during his employment. Consequently, there is no prior restraint and no such heavy burden on the United States to show irreparable damage to the country as was imposed by *New York Times*.

There is no suggestion that the secrecy agreements were the product of any fraud or duress or that the defendant was not fully competent at the time of their execution.

The Court finds that, contrary to the documents' proscriptions, the defendant has divulged and published and revealed, by writing and by word, information relating to the national defense and security and information of that nature relating to intelligent sources, methods and operations, both classified and otherwise, without first obtaining consent of the CIA.

The defendant does not contest that he has made the revelations and admits that at least some of the information in the article he gained as a result of his employment with CIA. Indeed, he trades upon his former connection with the CIA as putting him in a unique position to reform the intelligence gathering community of the United States. He seeks to avoid his contract by arguing that the First Amendment gives him rights which transcend any contractual obligations which might be imposed by the United States, and argues further that the United States cannot be considered a traditional employer but must only operate within the prohibitions of the First Amendment, any contract to the contrary notwithstanding.

Defendant cites no case which holds that the United States may not be viewed as an employer with the same contract rights as any other employer and this Court is unwilling to so hold.

In the Court's view the United States has made its case for specific performance when it shows the contract, a breach thereof, and the inadequacy of monetary damages.

The defendant further contests the jurisdiction of the Court, principally on the ground that there is no specific authority for a Federal Court to award injunctive relief

for threatened danger to national security. This argument, however, fails along with the failure of the First Amendment argument. 28 U.S.C. § 1345 clearly gives the District Court original jurisdiction of all civil actions.

A permanent injunction will be issued, identical in terms to the temporary restraining order heretofore entered. It is so ordered, and such an injunction will be entered upon presentation.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
May 19th, 1972

Permanent Injunction

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

Civil Action No. 179-72-A

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

VICTOR L. MARCHETTI,

Defendant.

This matter having come before the Court for trial on May 15, 1972 and the Court having considered the evidence presented and the arguments of counsel and having issued a Memorandum Opinion and Order on May 19, 1972, which sets forth findings of fact and conclusions of law respecting this controversy, and the Court being fully advised and having determined that the defendant has breached his secrecy agreements with the Central Intelligence Agency and that the United States is without an adequate remedy at law and is entitled to specific performance, it is by the Court this 19th day of May, 1972

ORDERED:

That the defendant, Victor L. Marchetti, his agents, servants, employees and attorneys, and all other persons in active concert or participation with him, and each of them, be, and they hereby are permanently enjoined from

further breaching the terms and conditions of the defendant's secrecy agreements with the Central Intelligence Agency by disclosing in any manner (1) any information relating to intelligence activities, (2) any information concerning intelligence sources and methods; *Provided*, however, that this Injunction shall not apply to any information, the release of which has been authorized in accordance with the terms and conditions of the aforesaid contract, and *Provided*, further, that this Injunction shall apply only with respect to information obtained by said defendant by reason of his employment under the aforesaid secrecy agreement and which has not been placed in the public domain by the United States; and it is

FURTHER ORDERED:

That the defendant shall submit to the Central Intelligence Agency, for examination 30 days in advance of release to any person or corporation, any manuscript, article or essay, or other writing, factual, fictional or otherwise, which relates to or purports to relate to the Central Intelligence Agency, intelligence, intelligence activities, or intelligence sources and methods, for the purpose of avoiding inadvertent disclosure of information contrary to the provisions and conditions of the aforesaid secrecy agreements, and such manuscript, article, essay or other writing shall not be released without prior authorization from the Director of Central Intelligence or his designated representative.

/s/ ALBERT V. BRYAN, JR.
United States District Judge